

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NATHAN UNGER, OFFICER OF	:	ORDER
ROBERT LANDAU ASSOCIATES, INC.	:	DTA #805351
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 10, 1980	:	
through August 31, 1984.	:	

Petitioner, by his representative, Wallace Musoff, Esq., has brought a motion pursuant to CPLR 603 and section 3000.5 of the Rules of Practice and Procedure of the Tax Appeals Tribunal for the trial of the issue of whether Nathan Unger is a person required to collect sales tax prior to the trial of the issue of the amount of sales tax which may be due. Upon the affidavit of Wallace Musoff, Esq., dated February 11, 1991, the affidavit of Jerome Kamerman, Esq., dated January 28, 1991, the petition and all the proceedings heretofore had herein, and upon the affidavit of Michael Gitter, Esq., dated February 19, 1991, in opposition to the motion for severance of issue, the following order is rendered.

The hearing on the petition of Nathan Unger, officer of Robert Landau Associates, Inc., was commenced on September 13, 1990. In general, the issues raised at the hearing are whether Nathan Unger was a person required to collect and pay over taxes on behalf of Robert Landau Associates, Inc. and whether the Division of Taxation properly determined the amount of tax due. At the hearing, the Division's auditor testified as to the audit method utilized. Thereafter, cross-examination and the presentation of petitioner's case was held in abeyance in order to give petitioner an opportunity to review the material presented by the Division and to give petitioner time to obtain and review the books and records of Robert Landau Associates, Inc. The hearing is scheduled to resume on March 19, 1991. By this motion, which was served February 11, 1991, petitioner requests that an order be granted which provides that the issue of whether

Nathan Unger is a person required to collect and pay over taxes on behalf of Robert Landau Associates, Inc. be tried prior to the trial of the issue of whether the Division of Taxation properly determined the amount of tax due.

In support of this motion, it is argued that all of the books and records of Robert Landau Associates, Inc. are warehoused by the trustee in bankruptcy of Robert Landau Associates, Inc. at a warehouse located in Long Island City, New York. When petitioner attempted to gain access to the books and records he was advised that there are approximately 130 boxes of various sizes. Petitioner estimates that due to the large volume of records, it will take approximately \$50,000.00 and a substantial amount of time to establish that the sales tax liability of Robert Landau Associates, Inc. has been paid. It is then submitted that petitioner does not wish to undertake this enormous financial burden prior to a determination of whether petitioner is responsible for any unpaid sales tax.

In opposition to the motion, the Division of Taxation argues that severing the issues will result in an unduly prolonged hearing in that a hearing would first have to be held as to liability and then the amount of liability would have to be determined. The Division also argues that the motion is untimely.

Petitioner's motion for a severance of issues is denied. It is the intent of the Rules of Practice and Procedure of the Tax Appeals Tribunal to provide the public with a "clear, uniform, rapid, inexpensive and just system for resolving controversies with the Division of Taxation" (20 NYCRR 3000.0[a]). The granting of petitioner's motion is contrary to the stated intent of said rules inasmuch as a severance of the issues presented herein raises the prospect of repeated hearings and determinations with a prolonged delay before there is a final resolution.

In reaching the foregoing conclusion, several points warrant attention. First, no authority has been cited where a forum has bifurcated a hearing on the issues of whether a person is required to collect tax and the amount of tax due. Secondly, as noted in Mr. Kamerman's affidavit, the hearing in this matter was continued for six months at petitioner's request in order to provide time for petitioner to review the books and records of Robert Landau Associates, Inc.

Having granted petitioner's request to permit such a review, further delay is not looked upon favorably.

Lastly, section 3000.5(a)(1) of the Rules of Practice generally requires all motions to be made within 90 days after service of a pleading by an adverse party. Where, as here, the Division's answer is dated May 17, 1988, and the motion was served February 11, 1991, the motion is untimely.

In reaching the foregoing conclusion, I am cognizant of the fact that preparation of that portion of the case concerning the amount of tax due will require a substantial undertaking and may be unnecessary. Therefore, the denial of petitioner's motion is without prejudice to a renewal of this motion upon completion of the cross-examination of the Division's auditor and the presentation of the evidence of the respective parties on the issue of whether petitioner was a person required to collect sales tax.

Petitioner's motion for severance of issue is denied without prejudice to a renewal of this motion as set forth above.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE